

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES  
SAN FRANCISCO BRANCH OFFICE**

GRANGE DEBRIS BOX & WRECKING  
COMPANY, INC.

Employer

and

Case 20–RC–17987

TEAMSTERS UNION, LOCAL 624

Petitioner

*J. Mark Montobbio, Att’y. of Fagghianti / Freitas LLP,*  
San Rafael, CA, for the Employer.

*Sheila K. Sexton and Sharon Seidenstein, Attys.*  
of Beeson, Tayer & Bodine, Oakland, CA for  
the Petitioner.

**SUPPLEMENTAL DECISION AND RECOMMENDED  
ORDER ON DISPOSITION OF CHALLENGED BALLOTS**

**WILLIAM L. SCHMIDT**, Administrative Law Judge. The issues for resolution here pertain to the eligibility of J. Guadalupe, Alvaro Jimenez, and Nick Hulbert, Sr., to vote in the pending representation election. Based on my findings and conclusions detailed below, I find all three employees eligible to vote and recommend the challenges to their ballots be overruled.

Pursuant to the Decision and Direction of Election (D&DE) issued on February 8, 2005,<sup>1</sup> by the Regional Director for Region 20, the National Labor Relations Board (NLRB or Board) conducted a secret ballot election among the employees in the following appropriate unit:

All full-time and regular part-time truck drivers and yard employees  
employed by the Employer at its San Rafael, California, facility during the  
payroll period ending February 3, 2005.

At the conclusion of the ballot count on March 23, the Regional Director caused to be served on the parties a copy of the official Tally of Ballots showing the following results:

Approximate number of eligible voters	10
Number of void ballots	0
Number of votes cast for the Petitioner	5

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<sup>1</sup> Where not shown otherwise, all further dates refer to the 2005 calendar year.

Number of votes cast against participating labor organization	2
Number of valid votes counted	7
Number of challenged ballots	3
Number of valid votes counted plus challenged ballots	10

As reflected in the above tally, sufficient challenged ballots exist to affect the election result. On March 29, the Petitioner filed timely Objections to the Election.

Following an investigation under Section 102.69 of the Board's Rules and Regulations, the Regional Direction issued a Report on Challenged Ballots and Objections, and Notice of Hearing dated April 19. In that Report, the Regional Director concluded that substantial and material issues of fact existed with respect to the three challenged ballots and Petitioner's objections. Accordingly, he ordered a hearing to resolve those issues. On April 27, the Regional Director approved the withdrawal of Petitioner's objections and ordered that the hearing be limited to the issues arising from the three challenged ballots. Board Exhibit 1(h).

I conducted the hearing concerning the challenged ballots at San Francisco, California, on May 3. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the Employer and the Petitioner, I make the following

#### Findings of Fact

##### A. The Challenged Ballots of Guadalupe and Jimenez

The Board Agent and the Petitioner challenged the ballots of J. Guadalupe and Alvaro Jimenez when they appeared to vote at the election on the ground that their names did not appear on the voting list. During the administrative investigation, the Employer explained that it inadvertently failed to include these two temporarily laidoff employees names on the pre-election *Excelsior* list. Board Exhibit 1(f): 2. At the hearing, Petitioner did not contest the Employer's assertion and withdrew its challenge to these two ballots with my approval. As no evidence shows that employees Guadalupe and Jimenez to be ineligible to vote, I recommend that the challenges to their ballots be overruled and that they be opened and counted.

##### B. The Challenged Ballot of Nick Hulbert, Sr.

The Employer challenged Hulbert's eligibility to vote on the ground that he submitted notices terminating his employment agreement with the Employer prior to the election.

As found in the D&DE, the terms and conditions of employment of the Employer's driver employees are contained in an "Owner / Operator / Transporter Agreement" (agreement) between each driver and the Employer. Hulbert executed such an agreement on August 18, 2000, and has worked continuously for the Employer since then. By its terms, Hulbert's agreement is effective for a "period of 60 months, commencing on delivery of truck." Petitioner's Exhibit 1: 1. Hulbert's agreement automatically renews itself unless one of the parties gives notice to terminate the agreement "not later than 180 days prior to the termination date" of the agreement. Petitioner's Exhibit 1: 6.

On February 14, Hulbert provided the Employer's owner, Fred Grange, with a written notice of his intent to terminate the agreement. The letter states:

Please accept this as written notification that as of the anniversary of my contract, August 18, 2005, I choose (sic) not to renew said contract. On that date, I will cease

working at Grange Debris Box. This is done to satisfy the terms of my contract, even though such contract may be deemed null and void. Should you request it of me, two weeks prior to my leaving, I will submit an official notice of my intention to terminate my working relationship with you on that date.

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Petitioner's Exhibit 2.

10 Subsequently, Grange asserted, in effect, that Hulbert's February 14 notice sought to prematurely terminate the agreement because Hulbert had not placed his truck in service until substantially after he executed the written agreement. For that reason, Hulbert sent a more detailed notice to Grange dated March 14. It states in pertinent part:

15 Please accept this as an updated written notification that as of the anniversary of my contract, August 18, 2005 I choose (sic) not to renew said contract. I received my truck from ACME Truck Parts & Equipment Inc. on November 7, 2000 and November 7, 2005 is the date sub-paragraphed in my contract as the final release or non-renewal date of my contract with Grange Debris Box. On that date, I will cease working at Grange Debris Box. This is done to satisfy the terms of my contract, even though such contract may be deemed null and void. Should you request it of me, two weeks prior to my leaving, I will submit an official notice of my intention to terminate my working relationship with you on that date. I still reserve the right to renew/re-negotiate a new contract with Grange Debris Box should I intend to do so at any time prior to the end of my said contract.

25 Petitioner's Exhibit 3.

30 Regardless of these two notices, Hulbert continued working for the Employer without interruption right up to the date of this hearing.<sup>2</sup> Moreover, he credibly testified that he sent these two notices solely to forestall the automatic renewal of his agreement. In any event, he plans to continue working for the Employer at least through November 7. In addition, Hulbert also credibly testified that he would work beyond November 7 if he succeeds in negotiating another agreement with Grange. However, Hulbert admitted that he has had discussions about selling his truck to another enterprise, relinquishing his apartment in the area, and moving to Sacramento. But, to date, Hulbert has not sought employment elsewhere.

35 The Employer argues that Hulbert's agreement-termination notices, provided before the election, establish that he "effectively resigned his employment with Grange." For this reason, the Employer contends that Hulbert was not eligible to vote in the election. The Petitioner contends that Hulbert met the eligibility requirements as he worked continuously for the employer through payroll eligibility date specified in the D&DE and at all times thereafter, including the date of the election.

40 In order to qualify as a voter in an NLRB representation election, an employee ordinarily must be (1) employed in the appropriate unit during the established eligibility period, here the payroll period ending February 3, and (2) in employee status on the date of the election. See *Dakota Fire Protection, Inc.*, 337 NLRB 92 (2001), citing *Plymouth Towing Co.*, 178 NLRB 651 (1969). Hulbert unquestionably met both eligibility requirements.

50 <sup>2</sup> Apparently, Hulbert worked for the Employer driving an Employer-provided truck from August 18, 2000, when he executed his agreement, to November 7, 2000, when he put his own truck in service. The agreement provides for such a contingency. Petitioner's Exhibit 1: 1.

The Employer's contentions about Hulbert's lack of eligibility lack merit. Hulbert's agreement–termination notices cannot reasonably be construed as an immediate resignation notice. His post–notice work record proves that beyond all doubt. Instead, I find Hulbert sent the termination notices to forestall automatic renewal of his existing work agreement. Although it might well be that Hulbert's employment could eventually be affected, that eventuality is far in the future and purely speculative at this early date. The Employer's apparent argument that the Board should assess Hulbert's community of interest with the unit found appropriate on conditions that may or may not exist six or more months from now would throw the entire election process established under Section 9 into turmoil and completely destabilize the system for the selection of employee representatives. The Employer makes no case for such a radical departure from the Board's historical eligibility rules.

Inasmuch as Hulbert actively worked on the requisite eligibility dates and continuously thereafter, I find him eligible to vote in the election the Regional Director directed in this case. Accordingly, I recommend that the challenge to his ballot be overruled and that his ballot be opened and counted.

Based on the foregoing findings and conclusions, I issue the following recommended<sup>3</sup>

### ORDER

This case is hereby remanded to the Regional Director for Region 20 with directions to open and count the challenged ballots of J. Guadalupe, Alvaro Jimenez, and Nick Hulbert, Sr.; prepare a revised Tally of Ballots; and issue an appropriate certification.

Dated: May 10, 2005, at San Francisco, CA.

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Administrative Law Judge

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<sup>3</sup> Within fourteen (14) days from the issuance of this supplemental decision, any party may file exceptions to it with the Board in Washington, D.C. Section 102.69 requires that a party filing exceptions must file an original and eight (8) copies with the Board together with a supporting brief, if desired. Any party filing exceptions must immediately serve a copy thereof on all other parties, and the Regional Director. Exceptions, if any, must be received by the Board in Washington, D.C. on or before **May 24, 2005**.